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In the SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1966

NO. 776

ROBERT LEWIS BANZER,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE NINETH CIRCUIT

STANLEY J. MITCHELL
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Portland, Oregon
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In the
UNITED STATES SUPREME COURT
UNITED STATES OF AMERICA

ROBERT LEWIS BANZER,)
Petitioner)
vs.)
)
UNITED STATES OF AMERICA,)
Respondant)

PETITION FOR CERTIORARI

COMES NOW, Robert Lewis Banzer, above named petitioner; and petitions this Honorable Court for a Writ of Review on Certiorari of the above entitled cause and as basis for this petition, your petitioner would show:

I.

Certiorari is sought in this cause and is based on an adverse decision on appeal from a judgment imposed following Petitioners conviction in the United States District Court for the District of Oregon, on six counts charging the petitioner with violation of Title 18 U.S.C.A. Section 2314. Said judgment was affirmed by the United States Court of Appeals for the Ninth Circuit. Said cause was heard before Justices Merrill and Koelsch, Circuit Judges and Justice Mathes, Senior District Judge. A copy of the opinion and Judgment of the Court of Appeals is attached hereto, marked Exhibit "A", dated and entered on the 18th day of October, 1966. From said opinion and Order petitioner seeks review on Certiorari.

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II.

The jurisdiction of this court is invoked for the reason that this charge eminates from an Indictment founded by the Federal Grand Jury in the United States District Court, for the District of Oregon in violation of Title 18, U.S.C.A. Section 2314. This appeal is based upon error of the trial court in violation of United States Constitution Amendment V. Jurisdiction is conferred upon this court by Article III, Section 2, of the United States Constitution.

III.

The questions presented for review of this Honorable Court are:

(1) Has the trial court and the United States Attorney the right to amend the charging part of an Indictment founded by the Grand Jury? and

(2) Whether or not such an amendment so made, would permit such a variance in proof, so as to affect the "substantive rights of the accused," guaranteed under Amendment VI of the United States Constitution of a speedy and impartial trial.

IV.

The constitutional provisions and statutes governing these questions are as follows:

(a) United States Constitution Amendment V, "No person shall be held to answer for a captial or otherwise infamous crime unless on a Presentment or Indictment of a Grand Jury".

Title 18, U.S.C.A. Section 1951

United States v. Fawcett 115 Fed 2d, 764
Steroni v. United States, 361 U.S. 212
80 Sct. 270, 4 L Ed. Section 252, Ex Parte Bain
121 U.S. 1, 7 Sct, 781, 30 L Ed. 849,
Stewart v. U.S. 9 Circ. 12, Fed 2d, Section 524
Krepper v. U.S. 159 Fed 2d, 958, 330 U.S. 824

(b) Article III, Section 2 United States Constitution.

The judicial powers shall extend to all cases in law and equity arising under this Constitution, the laws of the United States . . . .

The trial of all crimes . . . . . shall be by jury . . . . . .

V.

This is a criminal action based upon an Indictment founded by the Grand Jury under Title 18, U.S.C.A. 2314 charging the petitioner with the crime of Unlawful Transporation of Counterfeit Securities Interstate, in six counts, to which Indictment petitioner entered a plea of not guilty.

At the commencement of the trial the United States Attorney moved the trial court for an Order to amend the Indictment in County 1, changing the date of the alleged forged document from November 24, 1964, to "December 4," 1964, and changing the amount of the check from $98.27 to "$98.23"; and in Count 3, changing the amount of the check from $98.48 to "98.46", and in Count 5, changing the amount of the check from $98.40 to "$98.48". The trial Court over the objection of petitioner allowed the motion and permitted the Indictment to be amended to reflect the alterations requested by the United States Attorney. At the close of the plaintiff's case, petitioner declined to offer any testimony and the case was submitted to the jury resulting in a verdict of guilty on all six counts, upon which verdict petitioner was duly sentenced to be imprisoned for 5

years from which sentence an appeal was taken to the Ninth Circuit Court of Appeals wherein the Judgment of the lower Court was affirmed and this review on Certiorari is now sought, to correct error therein.

VI.

The error sought to be corrected was first raised at the outset of the trial wherein the trial Court ruled, "There is a pending motion before the Court to the counts of Indictment in connection with a number of clerical errors. The motion is allowed and exception is allowed to the defendant on the Order."

(Transcript of Testimony, Page 1)

VII.

The basis for Federal jurisdiction in the United States District Court for the District of Oregon is based upon Title 18, Section 2314 of the U.S.C.A. as relates to the Transportation of Forged Documents in Interstate Commerce; Article III, Section 2 United States Constitution conferring jurisdiction in this court; Amendment V provided for the prosection of criminal offenses by Presentment or Indictment of a Grand Jury; Amendment VI guaranteeing a speedy and impartial trial.

VIII.

It is the uniform ruling of the United States Courts and is the imperative requirement of Amendment V of the Constitution that no Indictment shall be altered by the trial Court or the United States Attorney; to hold otherwise would be of little avail if an Indictment once found can be changed by the prosecuting officer with the content of the Court to conform to the views of the necessity of the case.

Question No. 1 having been answered, the question then evolves whether or not such an amendment so made would permit such a "variance" in proof so as to affect the "substantive rights" of the accused guaranteed under Amendment VI of the Constitution, of an impartial trial. In this particular case petitioner was accused in six separate counts, each being a separate and distinct crime in and of itself. The Indictment was amended so as to avoid Counts 1, 3 and 5. The introduction into evidence of the documents appertaining to Counts 1, 3 and 5 (Exhibits 2, 4 and 6, Transcript page 26) are evidences of other crimes and have a tendency to inflame the jury and distort the facts so as to prevent the petitioner from having a fair and impartial trial. Petitioner is fully aware of numerous holdings of the courts in several jurisdictions, that even though an Indictment has been altered as to one Count, it would not void the Indictment as to another Count where there had been no alteration in the latter count.

It has long been an axiom of law that you cannot do indirectly that which you cannot do directly. To permit the courts and the prosecuting officer to amend portions of these Indictments, permits the prosecuting officer and the trial court to bring into evidence under the cloak of legality, evidence which otherwise could not be admitted in the case. Thus, the "substantive rights" of the accused guaranteed under Amendment V of the Constitution are grossly affected by such procedure. It is well settled that an Indictment once founded by the Grand Jury and altered by the Trial Court and the prosecuting officer becomes an Information of the United States Attorney and not an Indictment of the Grand Jury. The introduction of evidence of other crimes constitutes a "variance."

The general rule is that allegations and proof must correspond, is based upon the objective requirements:

(1) The accused shall be definitely informed as to the charges against him so that he may be able to present his

evidence and not be taken by surprise by the evidence offered at the trial.

(2) That he may be protected against another prosecution for the same offense. The evidence in this case (Transcript of Testimony Pages 11, 12, 60 and 61) discloses that a quantity of counterfeit blank checks of the type introduced in evidence where allegedly printed and in order for the petitioner to have had a fair and impartial trial, it is mandatory that he be fully apprised of the charges against him so that he may be able to present his defense and not be taken by surprise by the evidence offered at the trial.

WHEREFORE, petitioner respectfully prays that the Order and findings of the Ninth Circuit Court of Appeals be reversed and remanded and the conviction of the petitioner in the United States District Court for the District of Oregon be reversed and the conviction set aside and vacated.

By Robert Lewis Banzer
Robert Lewis Banzer – Petitioner

UNITED STATES OF AMERICA)
STATE OF OREGON) ss.
County of Clackamas)

I, ROBERT LEWIS BANZER, being first duly sworn on oath, depose and say: That I have read the foregoing Petition for Review on Certiorari in the above entitled court and cause, know the contents thereof and the same is true as I verily believe.

Robert Lewis Banzer

Subscribed and sworn to before me this 14th day of November, 1966.

Stanley J. Mitchell
Notary Public for Oregon
My Commission Expires: 1–21–69

(Seal)

CERTIFICATE OF ATTORNEY

I certify that in connection with the preparation of this Petition for Review on Certiorari on behalf of the Petitioner, that I have examined the rules promulgated and now in effect in the United States Supreme Court and that in my opinion, the the foregoing Petition is in full compliance with such rules.

/s/ Stanley J. Mitchell
Attorney for Petitioner

UNITED STATES OF AMERICA)
STATE OF OREGON) ss.
County of Multnomah)

Service of a copy of the within Petition for Review on Certiorari hereby is accepted in Multnomah County, Oregon, this 15th day of November, 1966.

SIDNEY I. LEZAK
United States Attorney

By /s/ Norman Sepenuk
Assistant United States Attorney

I hereby certify the foregoing to be a true and correct copy of the original Petition for Review on Certiorari in the above entitled Court and cause and the whole thereof.

Stanley J. Mitchell
Of Attorneys for Petitioner

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APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	
vs.	No. C-65-179
ROBERT LEWIS BANZER,	
Defendant.	

Portland, Oregon
February 16, 1966

BEFORE:

Honorable John F. Kilkenny, Judge.

APPEARANCES:

Mr. Norman Sepenuk, Assistant United States Attorney, of counsel for the Government.

Mr. Stanley J. Mitchell, Attorney for the defendant.

TRANSCRIPT OF PROCEEDINGS

THE COURT: Are the parties ready in United States against Banzer, CR 65-179?

MR. SEPENUK: Yes, your Honor.

THE COURT: There is a pending motion before the Court to the counts of the indictment in connection with a number of clerical errors. The motion is allowed, and exception is allowed to the defendant on the order.

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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT LEWIS BANKER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21,068

[October 18, 1966]

Appeal from the United States District Court
for the District of Oregon

Before: MERRILL and KOELSCH, Circuit Judges, and MATHES, Senior District Judge

PER CURIAM:

This is an appeal from the judgment imposed following appellant's conviction by jury verdict of the six offenses charged in the indictment, all violations of 18 U.S.C. § 2314.

Inasmuch as no error affecting the substantial rights of appellant appears in connection with his conviction on the second count of the indictment [Fed.R.Crim.P. 52(a)], and the sentences on all counts were imposed to commence and run concurrently, we need not reach the point of decision as to the remaining five counts. [See: *United States v. Romano*, 382 U.S. 136, 138 (1965); *United States v. Gainey*, 380 U.S. 63, 65 (1965); *Lawn v. United States*, 355 U.S. 339, 359 (1958); *Emspak v. United States*, 349 U.S. 190, 195 (1955); *Hirabayashi v. United States*, 320 U.S. 81, 85 (1943); *Sinclair v. United States*, 279 U.S. 263 (1929).]

Affirmed.

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APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT LEWIS BANZER, Appellant,	)	
vs.	)	No. 21,088
UNITED STATES OF AMERICA, Appellee,	)	

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered October 18, 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 776

ROBERT LEWIS BANZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in a jury trial in the United States District Court for the District of Oregon on all six counts of an indictment, charging the unlawful interstate transportation of counterfeit checks with knowledge that they were counterfeit, in violation of 18 U.S.C. 2314 (R. 1-3, 6-6A). On March 9, 1966, he was given concurrent sentences of imprisonment for five years on each of the six counts, to be eligible for parole at such time as the Board of Parole might

determine (R. 7). The conviction was affirmed on October 18, 1966.

At the start of the trial, the court ruled (Tr. 1):[1] "There is a pending motion before the Court to the counts of the indictment in connection with a number of clerical errors. The motion is allowed, and exception is allowed to the defendant on the order." The amendments permitted were (1) changing the date of the check in Count I from November 24, 1964, to December 4, 1964; and (2) changing the amounts of the checks in Counts I, III, and V from $98.27, $98.48 and $98.40 to $98.23, $98.46 and $98.48 respectively.

These amendments do not warrant reversal of petitioner's conviction on the ground that the court improperly allowed amendment of the indictment without resubmission to the grand jury.[2] This Court stated in *Russell* v. *United States*, 369 U.S. 749, 770,

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[1] "Tr." refers to the transcript of the trial testimony.

[2] Petitioner does not challenge the sufficiency of the evidence. Petitioner requested Stevenson and Hildebrand to assist him in setting up a counterfeit check-printing and cashing operation in Portland, Oregon (Tr. 4, 9, 59-60). At petitioner's request, Tolle started an "advertising agency" and obtained a printing press (Tr. 84-85). Petitioner used the press to print a number of counterfeit blank checks of the Safeco Lifeco Insurance Company (Tr. 11-12, 60-61). Petitioner's wife typed in fictitious dates, payees and amounts (Tr. 12-13; Gov. Exs. 2-7). Stevenson and Hildebrand, together with a girl named Caroline Young, cashed the checks in Seattle, using as identification counterfeit Washington drivers' licenses which had also been printed by petitioner (Tr. 12, 25-28, 43, 48-49, 58, 65). Upon returning to Portland, Stevenson and Hildebrand turned over a portion of the proceeds to petitioner (Tr. 65-67, 80).

that "* * * an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." The amendments in question here did not illegally broaden the scope of the indictment as was the situation in *Stirone* v. *United States*, 361 U.S. 212. The charges against petitioner remained the same and he was not misled as to the nature of those charges. The change of date on one check and the trivial changes in the amounts of three other checks were not of substance and they did not vitiate the indictment. *United States* v. *Denny*, 165 F. 2d 668 (C.A. 7), certiorari denied, 333 U.S. 844; *Dye* v. *Sacks*, 279 F. 2d 834, 837 (C.A. 6). In any event, since the amendments applied only to Counts I, III, and V, and the sentences were concurrent, petitioner's sentence can be upheld on any of the other three unchallenged counts. *United States* v. *Romano*, 382 U.S. 136, 138; *Lawn* v. *United States*, 355 U.S. 339, 359; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

DECEMBER 1966.

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